competent adviser who had no selfish end in view. In the case under discussion, the client needed no outside advice. And it is apparent that the bargain might easily have been to the advantage of the client, had the litigious trait of his character held out and his counsel lived longer. As it was, the disparity between the compensation and the value of the services as found by the court was not appalling. And how can the value of legal services be accurately measured in court after both attorney and client are dead?

These objections would seem to be outweighed by a consideration of the value of such a holding. The *quantum meruit* valuation may err as well on one side as the other. And the case serves to emphasize in high degree the nature of the relation between attorney and client, which perhaps may be termed a sacred one. However true the current saying that "The practice of law is no longer a profession, but merely a trade" may be, as applied to the nature of the attorney's work, the case stands firmly for the proposition that as to the lawyer's relation to his client the practice is not merely a profession, but one of exceptionally high character. The significance of the case in this connection is brought into clearer relief when coupled with the ruling which would undoubtedly have been handed down had the services been more valuable than the agreed compensation. Unquestionably, the attorney would have been limited to the amount of the bond.[13] The case under discussion certainly goes the limit. It serves, however, not only to protect the public from the sharp dealings of overreaching practitioners, but also to insure a high regard for the honor of their calling among the members of the profession itself.[14]

T. L. P.

HOW TO COME TO ISSUE IN AN ACTION OF DEBT ON A BOND CONDITIONED UNDER § 6262 VA. CODE, 1919.—§ 6262 of the Code of 1919 provides:

> "In an action on an annuity bond, or a bond for money payable by installments, where there are further payments of the annuity, or further installments to become due after the commencement of the action, or in any other action for a penalty for the non-performance of any condition, covenant, or agreement, the plaintiff may assign as many breaches as he may think fit, and shall, in his declaration or scire facias assign the specific breaches for which the action is brought, or the scire facias is sued out."

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[13] McIlvoy *v.* Russell, 15 Ky. Law Rep. 740, 24 S. W. 3; Walsh *v.* Board, 17 Mont. 413, 43 Pac. 180.

[14] For further authorities upon this general subject, see 83 Am. St. Rep. 159, and 2 R. C. L. 1036-1046.

This statute is mandatory; hence when the plaintiff sues in debt on a bond conditioned he must specifically assign the breaches which make the bond to be of "full force and virtue". Obviously the purpose of this enactment is to simplify the pleadings, to make them more specific, and also to permit issue to be more quickly arrived at than under the old method. Another reason for the enactment is to apprise the defendant of the specific nature of the charges against him.[1]

The regular way at common law of suing in debt on bond conditioned was to set out the obligation of the bond and ignore the conditions, since they are conditions subsequent. It was left for the defendant to bring in the conditions by craving oyer and pleading performance generally, and the plaintiff then had to reduce the matter to certainty by assigning specific breaches in the replication.[2] The defendant craves oyer of the bond and pleads performance generally,[3] and concludes with a verification. "The plaintiff must now reply to the plea of performance. Regularly he would use a common traverse denying performance and tender issue. But this would not make a sufficiently certain issue. So the plaintiff must reply and assign a breach of the covenants; and, as this assignment of a breach is new and affirmative matter, the plaintiff must not conclude to the country (tender issue), but with a verification ('this he is ready to verify'), thus assuming the burden of proof as to the breach alleged by him." [4]

But at common law the defendant can only plead performance generally when the conditions are positive. It is otherwise when the conditions are negative, disjunctive, or alternative, for in these latter cases the pleadings must be more specific.[5]

In replying, by way of traverse, to a declaration on a bond conditioned, in which the conditions are set out, and breaches are specifically assigned, there are four possible methods open to the defendant. We shall consider each separately.

I. Plead "conditions performed" generally, and end with a conclusion to the country, since no new matter is alleged, thus tendering issue on what would amount to a very broad issue. If the plaintiff should then join in the issue, the cause would then go to trial and under the issue produced defendant could show specifically how, when, and where he performed the conditions. This would then leave the burden of proof on the plaintiff, where it ought to be.

But there are several very serious objections to this issue in that it would not be sufficiently certain or specific. Under this very broad issue the defendant could introduce any number of

[1] See Governor *v.* Roach, 9 Gratt. 13.
[2] STEPHEN, PLEADING, Andrews' 2nd. ed., § 224, p. 419.
[3] Bailey *v.* Rogers, 1 Me. 186.
[4] GRAVES, COMMON LAW PLEADING, § 79a.
[5] STEPHEN, PLEADING, Andrews' 2nd. ed., § 224, p. 423; Tucker *v.* Lee, Fed. Cas. No. 14,221; see Bailey *v.* Rogers, *supra.*

facts to prove his contentions and the issue would be obscure, confused and equivocal.

II. The second possible method of pleading to the declaration is to plead "conditions performed" generally and end with a verification. But this plea would seem to be fatally bad for a number of reasons:

1. The verification is not the proper ending, since the defendant has alleged no new matter.[6]

2. This plea would protract the pleadings by throwing upon the plaintiff the burden of again repeating in the replication the breaches assigned in the declaration before the parties can come to issue.[7] Such a plea would postpone the issue one stage further than is necessary, and hence would defeat the very object for which the statute was enacted.

3. Such a plea would make the pleadings repetitious by requiring the plaintiff to assign again the breaches of the conditions in the replication. This would violate one of the fundamental rules of pleading which tend to prevent obscurity and confusion.

4. A plea of this kind would prevent certainty of issue; nor would the plaintiff be informed of the facts which the defendant relied upon as a defense.

5. There would be no particularity of issue on which to try the cause.[8]

6. Such a plea would also appear to shift the burden of proof from the plaintiff to the defendant, since the latter stands ready to verify the specific performances alleged in his plea. This is a serious defect, as it violates the fundamental principle that the burden of proof should be on the party who has the affirmative of the issue.

III. A third way by which the defendant might plead to a declaration which assigns specific breaches is to answer specifically the several pleas, setting out just when, where, and how he performed the conditions, and conclude with a verification. Upon slight thought, this might appear to be the logical way to plead in such a situation. It would make the pleadings particular, issuable, certain, and single. And the cause could proceed to trial at once on the issues reached. And it might also seem that a verification is the proper conclusion, since the defendant really introduces new matter into the pleadings. But upon more mature reflection, the objections to this way of pleading would seem to be fatal.

1. It would make the pleadings repetitious, since the plaintiff cannot join in the issue, as the defendant has ended with a verification, but he would be compelled to reassign the breaches as

[6] STEPHEN, PLEADING, Andrews' 2nd. ed., § 168, p. 335.
[7] See Commonwealth *v.* Gower, 4 Litt. (Ky.) 279.
[8] STEPHEN, PLEADING, Andrews' 2nd. ed., § 216, p. 405.

alleged in the declaration. It is obvious that this would make the pleadings unduly long and drawn out.

2. This method would unduly prolong the pleadings as the issue would certainly be postponed one stage longer than would be necessary. Hence, even though the defendant has set forth new matter, the policy of the statute, which is to make the pleadings shorter, simpler, and more certain, would seem to justify throwing aside the rule requiring a verification when new matter is alleged and pleading according to the fourth possible method, *viz:*

IV. Plead specifically to the breaches assigned and end with a conclusion to the country.

The orthodox common law method prevailed in England up to the passage of 8 and 9 Wm. III, c. 11, § 8. But by that statute it was made necessary for the plaintiff, in his declaration, on all bonds, with a few exceptions, to set out the conditions and show the breaches. The defendant could not in that case plead the general denial, but was required to traverse the breaches assigned and conclude to the country.[9]

The Virginia statute, *supra,* along with those of many other States, is closely modeled after this English statute. And, although the method of coming to issue on a bond conditioned under this statute has never been decided in Virginia, the overwhelming weight of authority in this country agrees with the English authorities decided under the English statute, cited *supra,* in holding that when the plaintiff specifically assigns breaches in the declaration the defendant must answer them specifically and conclude to the country.[10]

In *Tait* v. *Parkman, supra,* Dargan, J., delivering the opinion of the court, said:

> "In the case of the Commonwealth, use of Carswell *v.* Gower, 4 Litt. 279, the plaintiff declared on a bond executed by Gower, conditioned faithfully to perform the duties of jailor. The declaration set out a specific breach of the condition, and the defendant pleaded condition performed generally, without setting out the mode or the manner of performance. To this plea there was a demurrer. The Supreme Court of Kentucky held the plea to be insufficient; and in the opinion delivered, said, 'that in an action on a deed containing general affirmative covenants, the defendant may plead performance generally, but if there is a specific breach alleged, the defendant must respond specially to it, and cannot plead performance generally, and thereby throw on the plaintiff

[9] See Dime Sav. Inst. *v.* Am. Surety Co., 68 N. J. L. 440, 53 Atl. 217; also note 1 to Cutler *v.* Southern, 1 Wms. Saund. 116, 85 Eng. Rep. 125.

[10] See Postmaster General *v.* Cochran, 2 Johns. (N. Y.) 412; Tait *v.* Parkman, 15 Ala. 253; Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405; Tinney *v.* Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620.

the burthen of repeating the same facts in his replication, stated in the particular breach assigned in the declaration'.

"This we hold to be the correct mode of pleading, and although a defendant may plead performance generally, when no breach is assigned, and thereby compel plaintiff in his replication to set out the breach on which he relies, yet when the plaintiff assigns specially the breach of the condition in his declaration, the defendant should plead specially to it, and set out the mode and manner of the performance. The propriety of this mode of pleading will be more apparent, if we reflect that a condition in a deed may be performed by doing one or two or three distinct things; and if the plea of performance is good, to a declaration setting out a particular breach, the court could not, by examining the record, ascertain the distinct facts put in issue; nor would the plaintiff be informed of the facts that the defendant relied on as a defence. For instance, the condition of the bond declared on, might be saved by payment of the debt, or the defendant might have made a surrender of his effects, and taken the benefit of the insolvent laws; or might, at the expiration of sixty days, have surrendered himself to close confinement; either of those acts would have saved the condition of the bond; but which he intended to rely on by the plea of general performance, could not appear; and to hold that a plaintiff should repeat in a replication the assignment averred in the declaration, to which the defendant should rejoin specially, and in his rejoinder state how the condition was performed, would be to lengthen out the pleadings, and swell the record for no practical purpose whatever."

And so a general plea of performance to a declaration specifically assigning breaches is bad on demurrer.[11]

But, of course, when, in an action on a bond, several breaches are assigned, defendant may deny, or confess and avoid in several pleas, thereby forming an issue as to the separate breaches; but the entire assignment must be answered.[12]

Therefore the authorities seem to be clear that a general plea of "conditions performed" to a declaration assigning specific breaches is insufficient and will be held so on demurrer. This is true even at common law, and *a fortiori* it would seem to be true under the Virginia statute, whose object is to make for short, simple and specific pleadings.

This principle is not only the doctrine by the great weight of authority but appears also to be sound on principle. It cannot be denied that it shortens pleadings and makes them more spe-

[11] People *v.* McHatton, 7 Ill. 730; Mix *v.* People, 86 Ill. 329. See also cases in note 10, *supra.*

[12] Sugden *v.* Beasley, 9 Ill. App. 71.

cific, simple and certain. The parties are apprised of the exact nature of the issues to be tried, and the specific points on which they must rely. The issues are made specific, simple, certain and single.

The doctrine also seems to be sound upon the principle that the burden of proof should be upon the plaintiff in the case. By the defendant ending his plea with a conclusion to the country, issue is tendered and the burden of proof is still upon the plaintiff who alleged the specific breaches. And it does not seem, either by authority or on principle, that the mere technical rule that a pleading which introduces new matter should end with a verification should be allowed to overrule the policy of the statute, unduly lengthen the pleadings, and throw the burden of proof on the wrong party (the defendant).

F. W. D.